

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARGARET A. SHEPHERD,

Plaintiff,

v.

OFFICER GARRET CRAWFORD, *et al.*,

Defendants.

1:08-CV-00128 OWW DLB

MEMORANDUM DECISION RE;
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT (DOC. 30)

I. INTRODUCTION

This case arises out of the arrest of Plaintiff, Margaret Shepherd, on January 14, 2007. Plaintiff alleges that Officers of the City of Modesto Police used excessive force incident to her arrest, causing her injuries. Before the court for decision is a Motion for Summary Judgment filed by Defendants City of Modesto ("City"), City of Modesto Police Sergeant Garret Crawford, and City of Modesto Police Officers Douglas Griepp, David Angarole, Todd Musto, Joseph Pimental, Tony Scopesi, and Yair Oaxaca. Doc. 30.¹

Plaintiff's complaint asserts four claims based upon

¹ Defendants have also filed a motion to strike Plaintiff's expert witnesses. Doc. 31, filed Feb. 13, 2009. That motion is addressed in a separate memorandum decision.

1 allegations of excessive force and wrongful arrest: (1) violation
2 of Title 42, United States Code, Section 1983 against all
3 individual defendants; (2) assault and battery against all
4 individual defendants; (3) false arrest against all individual
5 defendants; and (4) violation of Section 1983 against the City of
6 Modesto related to alleged training and/or supervision
7 deficiencies. Doc. 1, filed Jan. 25, 3008. Plaintiff
8 voluntarily dismissed the false arrest claim as to all
9 defendants, Doc. 39, filed Mar. 24, 2009, as well as all claims
10 against Defendants Angarole and Musto, Doc. 40, filed Mar. 24,
11 2009.

12 13 II. FACTUAL BACKGROUND

14 It is undisputed that the events giving rise to Plaintiff's
15 arrest took place at approximately 1:00 a.m. on January 14, 2007.
16 Compl. at ¶6. At that time, Plaintiff was at a club called the
17 Copper Rhino Sun in the downtown entertainment district of
18 Modesto, California, with approximately ten other individuals
19 celebrating the twenty-first birthday of Plaintiff's son. *Id.*
20 It is also undisputed that Plaintiff consumed three drinks that
21 evening, a small glass of champagne and two white Russians.
22 Margaret Shepherd Depo. at 32, 43-44, 47-48. In almost all other
23 respects, the parties' versions of the events of that evening are
24 in conflict.

25 According to the owner of the Copper Rhino, Mr. Leslie
26 Knoll, Plaintiff's group was loud and obnoxious, and at least one
27 member of the group was insulting other customers. Knoll Depo.
28 at 13. After unsuccessfully requesting Plaintiff's group to

1 quiet down, Mr. Knoll contacted one of his private security
2 guards (Defendant Griffin Dye) and told him to remove Plaintiff's
3 group from the bar. *Id.* at 13-14. Dye then informed one of the
4 members of the group, Larry McKenzie, that he was being "a
5 problem" and would have to be walked outside. Dye Depo. at 21.

6 According to Plaintiff, Larry ended up on the ground with
7 Dye standing over him. M. Shepherd Depo. at 77. One of
8 Plaintiff's sons, Lucas Shepherd, hollered at Dye "What are you
9 doing? He's just wanting to get his hat." *Id.* Then, according
10 to Plaintiff, there was a lot of pushing and shoving, with people
11 trying to get out of the club. *Id.* at 78; see also Amy Shepherd
12 Depo. at 20. Plaintiff recalls that Dye then grabbed her son
13 Lucas around the neck in a choke hold. *Id.* Other witnesses,
14 including Lucas, recall that Lucas ended up being thrown to the
15 ground by one of the bouncers, possibly Dye. Wheeler Depo. at
16 20-22; L. Shepherd Depo. at 26, 29-30.

17 In contrast, Dye recalls that Larry began to leave the
18 premises peacefully and that some other members of the group
19 began to gather up their things to leave with him. Dye Depo. at
20 23. However, as Dye and Larry were leaving the club's patio,
21 where Larry and the others had been socializing, Dye heard
22 someone yelling from behind him. *Id.* at 23-24. Dye turned
23 around and observed Lucas, who had just entered the patio area
24 from the bar, running after him. *Id.* at 24. The next thing Dye
25 saw was "the ground." He cannot recall whether Lucas knocked him
26 to the ground, or whether he was knocked to the ground by the
27 rush of others leaving the club. *Id.* at 25.

28 According to Knoll, the club's owner, the situation

1 escalated, resulting in individuals within Plaintiff's group
2 hitting the security guards. Knoll Depo. at 19.

3 At some point, either while the party was moving outside or
4 shortly after, officers from the Modesto Police Department began
5 arriving on the scene. One of the first officers to arrive was
6 Sergeant Crawford, who observed what he characterized as "a large
7 melee." Crawford Depo. at 41. Crawford noticed eight or nine
8 individuals actively engaged in fighting with security guards on
9 the sidewalk. In response, the security guards were attempting
10 to place handcuffs on certain individuals and trying to arrest
11 the assailants. *Id.* at 32.

12 A number of police officers eventually responded to the
13 scene, including at least two on horseback. These officers
14 became occupied with the apprehension of various individuals
15 and/or restoring order to the scene.

16 According to Sergeant Crawford, as he approached the crowd,
17 his attention was drawn to a white, female adult (later
18 identified as Plaintiff), because she was on the back of a
19 security officer (Dye). She appeared to have her right arm
20 around the security officer's throat, holding him in a head lock.
21 Crawford recalls that Plaintiff's feet were off the ground, as
22 though she was "riding" on the security officer's back. *Id.* at
23 33, 46. Crawford observed that the same security officer was
24 attempting to place handcuffs on a male subject. *Id.* at 46-47.
25 In response, Sergeant Crawford claims he approached Plaintiff,
26 grasped her free (left) arm with his left hand, and identified
27 himself loudly as a Modesto Police Officer. *Id.* at 33. She did
28 not respond. *Id.* Plaintiff remained on the guard's back,

1 screaming: "Let go of my son." *Id.* at 47.

2 Crawford believed that the guard was in "obvious distress"
3 during this altercation, because he was in a headlock while
4 trying to handcuff someone. *Id.* at 47. Crawford again yelled in
5 Plaintiff's presence that he was a police officer, while still
6 holding on to her left arm with his left hand. *Id.* at 49-50.
7 Crawford then took Plaintiff's left arm and pulled it up behind
8 her back. *Id.* at 50. He ordered her for a third time to release
9 the guard and again told her he was a police officer. *Id.* at 52.
10 Crawford then put his right hand on her right shoulder and pulled
11 it straight back, away from the security officer. *Id.* Her arm
12 came out from around the guard's neck, and she fell backward.
13 *Id.* at 53. According to Crawford, Plaintiff landed on her feet
14 at first, but then stumbled and bumped into someone else,
15 knocking that person to the ground and falling on top of that
16 person. *Id.* That caused Crawford to lose his grip on her. *Id.*

17 At this point, according to Crawford, Plaintiff became
18 hysterical, screaming about why her son was being arrested,
19 flailing her arms and feet "in all directions, striking out,
20 hitting and kicking anybody in the area." *Id.* at 56. Crawford
21 asserts that "[t]rying to gain control of [Plaintiff's] hands and
22 feet was quite dangerous at that point." *Id.* at 57. Crawford
23 was standing on his feet, bending over at his waist, trying to
24 grab her hands and place her in handcuffs. *Id.* Although he was
25 able to get one of her hands, he could not grab the other one.
26 *Id.* That is when Officer Grieppe approached. *Id.* Crawford
27 waived him over to assist. Grieppe was able to grab the other
28 arm. *Id.* She was still screaming hysterically and resisting

1 arrest. She managing to pull away several times as they placed
2 her in handcuffs. *Id.* at 64-64.

3 Crawford maintains that neither officer placed his knees on
4 her back. *Id.* at 64. Crawford asserts that he purposefully
5 avoided doing so, because lowering himself to the ground would
6 have allowed her flailing arms and feet to hit his body. *Id.*
7 Crawford was also concerned about a nearby horse, belonging to a
8 mounted policeman. Crawford did not want to go any lower on the
9 ground, to avoid potential contact with the horse. *Id.*

10 Once Plaintiff was ultimately restrained, Officers Crawford
11 and Grieppe escorted Plaintiff to a patrol car and placed her in
12 the back seat of that car, where she stayed until being
13 transported to another police vehicle for transport to jail. *Id.*
14 at 68:8-19.

15 Crawford's version of events is corroborated by Knoll, who
16 testified that he personally observed "the police dragging a lady
17 off who was trying to choke [Dye]." Knoll Depo. at 20-21. Knoll
18 stated: "It looked like she was on the pile and was trying to
19 either hit or choke him. I just caught a glimpse of it, so I
20 don't know exactly." *Id.* at 21.

21 For his part, Dye does not recall anyone trying to choke him
22 that evening, nor does he have any recollection of Plaintiff.
23 Dye Depo. at 33.

24 Plaintiff's recollection of the arrest is dramatically
25 different than Crawford's. She asserts that she was propelled
26 outside the club onto the sidewalk with the rush of bodies
27 leaving the club. M. Shepherd Depo. at 83. Observing one of the
28 security guards with his arm around her son Lucas' neck, she

1 yelled: "What are you doing to my son?" *Id.* The guard did not
2 acknowledge her. *Id.* She then reached up to touch the bouncer's
3 arm in order to get his attention because she wanted to know what
4 he was doing to her son. *Id.* at 82. Then, with no warning or
5 provocation, someone pulled her right arm back and she felt a
6 pain in her shoulder. *Id.* at 88. Then, her feet left the ground
7 and she was slammed face first into the ground, onto her chest.
8 *Id.* at 89. Plaintiff then recalls feeling a great deal of
9 pressure and pain in her back. *Id.* at 91. She felt a weight on
10 her back and her arms were pulled behind her. *Id.* at 92. She
11 recalls that she "couldn't breathe," and her arms felt like they
12 were going to be pulled off. *Id.* at 92-93. She was trying to
13 gasp for air and then "started seeing stars." *Id.* at 93. Next,
14 she felt pain on her wrists. She assumes this was caused by the
15 officers putting handcuffs on her. *Id.* at 94. She was "yanked
16 up to [her] feet," at which time she realized police officers
17 were present. *Id.* at 95-96. She was then guided to a police
18 car. *Id.* at 96-97.

19 One witness recalls that Crawford "jumped down onto
20 [Plaintiff's] back, and [] had his knees in her back." Wheeler
21 Depo. at 25. Others corroborate that at least one of the
22 officers had his knees in her back. A. Shepherd Depo. at 29; D.
23 Shepherd Depo. at 45.

24 It is undisputed that at the time of the incident, Plaintiff
25 was over 50 years of age, was 5 feet, 4 inches tall, and weighed
26 150 pounds. *Id.* at 80. Crawford was 5 feet, 10 inches tall, and
27 weighed 230 pounds.

28 Ultimately, Plaintiff was cited for a violation of

1 California Penal Code section 148 for delaying and obstructing a
2 police officer. The police report states:

3 On 1-14-07 at approximately 0051 hours I responded to a
4 report of a fight at the Copper Rhino on 10th St. On
5 arrival I saw a security guard attempting to handcuff a
6 suspect on the sidewalk (D) grabbed the security guard
7 around the neck from behind and attempted to pull him
8 from her son, Andrew Shepherd. I ordered (D) to
9 release the guard and she refused. I pulled (D) by her
10 arms away from the guard and she fell to the ground on
11 top of a bystander. (D) began to punch and kick at
12 anyone she could while on the ground. I told (D) she
13 was under arrest and to stop fighting. (D) refused and
14 continued to fight. (D) was handcuffed by Officer
15 Griep and myself. (D) booked to Stanislaus County
16 jail.

17 Arrest Report prepared by Sergeant Crawford, Ex. P to Gilbert
18 Decl., Doc. 30-4 through 30-10.

19 III. STANDARD OF DECISION

20 Summary judgment is appropriate when "the pleadings, the
21 discovery and disclosure materials on file, and any affidavits
22 show that there is no genuine issue as to any material fact and
23 that the movant is entitled to judgment as a matter of law."
24 Fed. R. Civ. P. 56(c). A party moving for summary judgment
25 "always bears the initial responsibility of informing the
26 district court of the basis for its motion, and identifying those
27 portions of the pleadings, depositions, answers to
28 interrogatories, and admissions on file, together with the
affidavits, if any, which it believes demonstrate the absence of
a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477
U.S. 317, 323 (1986) (internal quotation marks omitted).

Where the movant will have the burden of proof on an issue
at trial, it must "affirmatively demonstrate that no reasonable

1 trier of fact could find other than for the moving party."
2 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.
3 2007); see also *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d
4 885, 888 (9th Cir. 2003) (noting that a party moving for summary
5 judgment on claim as to which it will have the burden at trial
6 "must establish beyond controversy every essential element" of
7 the claim) (internal quotation marks omitted). With respect to
8 an issue as to which the non-moving party will have the burden of
9 proof, the movant "can prevail merely by pointing out that there
10 is an absence of evidence to support the nonmoving party's case."
11 *Soremekun*, 509 F.3d at 984.

12 When a motion for summary judgment is properly made and
13 supported, the non-movant cannot defeat the motion by resting
14 upon the allegations or denials of its own pleading, rather the
15 "non-moving party must set forth, by affidavit or as otherwise
16 provided in Rule 56, 'specific facts showing that there is a
17 genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty*
18 *Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "Conclusory, speculative
19 testimony in affidavits and moving papers is insufficient to
20 raise genuine issues of fact and defeat summary judgment." *Id.*

21 To defeat a motion for summary judgment, the non-moving
22 party must show there exists a *genuine* dispute (or issue) of
23 *material* fact. A fact is "material" if it "might affect the
24 outcome of the suit under the governing law." *Anderson*, 477 U.S.
25 at 248. "[S]ummary judgment will not lie if [a] dispute about a
26 material fact is 'genuine,' that is, if the evidence is such that
27 a reasonable jury could return a verdict for the nonmoving
28 party." *Id.* at 248. In ruling on a motion for summary judgment,

1 the district court does not make credibility determinations;
2 rather, the "evidence of the non-movant is to be believed, and
3 all justifiable inferences are to be drawn in his favor." *Id.* at
4 255.

6 IV. DISCUSSION

7 A. Claims against Officers Pimental, Scopesi, and Oaxaca.

8 Defendant moves for summary judgment as to all claims
9 against Officers Pimental, Scopesi, and Oaxaca on the ground
10 that, although all five officers were present during the brawl at
11 the Copper Rhino, only two officers (Crawford and Griep) were
12 involved in Plaintiff's arrest.²

13 The Complaint is vague about the various Officers' conduct,
14 alleging:

15 Two or three Modesto Police officers, including
16 defendants CRAWFORD and GRIEPP jumped on Plaintiff.
17 One of the officers pinned Plaintiff to the ground with
18 his knee and broke four of her ribs.

19 Compl. at ¶10. In response to special interrogatories asking
20 Plaintiff to identify all facts which support her contention that
21 each of these individual officers was liable for the incident
22 giving rise to this litigation, Plaintiff stated:

23 I don't know which officers did what. I just know one
24 or two of them threw me to the ground and wrenched my
25 arms back so hard I thought they were going to
26 be ripped from the sockets at my shoulders and then
27 excruciating pain in my back making my body bow up
28 backwards and being unable to breath. Then being
29 yanked up by the handcuffs on my wrists, shoved to a
30 police care (sic) and thrown into the back of it. When

31 ² Plaintiff has voluntarily dismissed all claims against
32 two additional officers: Officers Angarole and Mustaro. Doc.
33 39, filed Mar. 24, 2009.

1 I tried to convey many times the pain I was in and that
2 I couldn't breath, at one point I was told, "If I could
3 open my big mouth, I could breath." and while being
4 transported in the police car, I stated the bouncer
5 should not have touched my son; the officer replied
6 "Maybe you should have stayed out of our town."

7 Response to Special Interrogatory No. 1, attached to the
8 Declaration of Kevin Gilbert, Doc. 30-4 through 30-10, Ex. N.
9 With respect to Defendants Pimental, Scopesi, and Oaxaca,
10 Plaintiff indicated that she "[did] not know which officers did
11 what." Responses to Special Interrogatories Nos. 9-11.

12 Plaintiff has not identified any facts suggesting any of the
13 three officers were in any way involved in her physical restraint
14 and/or arrest. Instead, she argues that Officers Pimental,
15 Scopesi, and Oaxaca must have been aware that she was being
16 subjected to "constitutionally unreasonable force during her
17 arrest," but "did nothing to prevent the abuse" and therefore
18 should be "subject to personal liability for their failure to
19 act." Doc. 342 at 8. In support of her theory of liability,
20 Plaintiff cites *Byrd v. Clark*, 783, F.2d 1002, 1007 (11th Cir.
21 1986), abrogation on other grounds recognized by *Nolen v. Isbell*,
22 207 F.3d 1253, 1255-56 (11th Cir. 2000), which held that when "a
23 police officer, whether supervisory or not, fails or refuses to
24 intervene when a constitutional violation such as an unprovoked
25 beating takes place in his presence, the officer is directly
26 liable under Section 1983."

27 Defendants rejoin by citing a line of California cases which
28 stand for the proposition that police officers do not generally
owe a duty of care to protect members of the public, unless a
special relationship is established. For example, *Davidson v.*

1 *City of Westminster*, 32 Cal. 3d 197 (1982), held that officers
2 conducting surveillance of a business were under no duty to warn
3 an innocent third party known to be alone on the premises of the
4 arrival of a suspected assailant. Neither the decision to
5 conduct the surveillance, the observation of the potential
6 assailant in the victim's presence, nor the recognition of the
7 assailant as the likely perpetrator of a previous assault created
8 a "special relationship" between the victim and the police that
9 gave rise to a duty to act or warn. *Id.* at 206-207; see also
10 *Williams v. State*, 34 Cal. 3d 18 (1983) (California state highway
11 patrol officer has the right, but not the duty to investigate
12 accidents, or come to the aid of stranded motorists, and that
13 stopping to aid an injured or stranded motorist does not, in
14 itself, create a special relationship which gives rise to an
15 affirmative duty to secure information or preserve evidence for
16 civil litigation between the motorist and third parties).

17 But, the Ninth Circuit recognizes that "police officers have
18 a duty to intercede when their fellow officers violate the
19 constitutional rights of a suspect or other citizen." *Cunningham*
20 *v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (citing *United*
21 *States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir.1994), *rev'd on*
22 *other grounds*, 518 U.S. 81 (1996)). "[O]fficers can be held
23 liable for failing to intercede only if they had an opportunity
24 to intercede." *Cunningham*, 229 F.3d 1289. If an officer was not
25 present, or had "no realistic opportunity to intercede," no
26 liability will attach. *Id.*

27 There is scant authority applying "failure to intercede"
28 liability in the context of the use of excessive force. In the

1 corrections context, a prison guard has an affirmative duty to
2 intervene on behalf of a prisoner if other officers are violating
3 the prisoner's constitutional rights in his presence, or if he
4 knows that the prisoner's rights are being violated. *Robins v.*
5 *Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995). However, there must
6 be a causal connection between the defendant and the deprivation
7 of a constitutional right. *Johnson v. Duffy*, 588 F.2d 740, 743
8 (9th Cir. 1978). In the policing context, where defendant
9 officers failed to act in the presence of an alleged use of
10 excessive force by other officers, "factors such as whether the
11 defendant had reasonable time to intervene, and whether the
12 defendant had tacitly collaborated with the officers using force
13 should be considered." *Garcia v. Grimm*, 2007 WL 2778360, *6
14 (S.D. Cal. 2007) (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11
15 (2d Cir. 1988). The reasoning of the Second Circuit in *O'Neill*
16 is instructive:

17 In this case, the claim that [Officer] Conners became
18 liable for use of excessive force by failing to
19 intercede must be assessed separately with respect to
20 the acts of [Officers] Fiorillo and Krzeminski in
21 striking O'Neill and the act of Krzeminski in dragging
22 O'Neill across the floor by his throat. Even when the
23 evidence is viewed in the light most favorable to the
24 plaintiff, there is insufficient evidence to permit a
25 jury reasonably to conclude that Conners' failure to
26 intercede was a proximate cause of the beating. The
27 three blows were struck in such rapid succession that
28 Conners had no realistic opportunity to attempt to
prevent them. This was not an episode of sufficient
duration to support a conclusion that an officer who
stood by without trying to assist the victim became a
tacit collaborator. With respect to the subsequent
dragging of O'Neill across the floor, however, the case
against Conners is adequate to create an issue of fact
for the jury. Having seen the victim beaten, he was
alerted to the need to protect O'Neill from further
abuse. Though not a guarantor of O'Neill's safety in
the face of brutality administered by other officers,
Conners can be found liable for deliberately choosing

1 not to make a reasonable attempt to stop Krzeminski.
2 *Id.* at 11-12. Critically, the evidence in *O'Neill* subjected the
3 officer to liability for "deliberately choosing not to make a
4 reasonable attempt" to stop another officer's allegedly
5 unconstitutional conduct because he actually observed that
6 conduct.

7 Here, in contrast, the relevant testimony of Oaxaca,
8 Pimental, and Scopesi, which is undisputed, indicates that none
9 of the three officers observed Crawford and/or Grieppe placing
10 Plaintiff under arrest.

11 Officer Oaxaca, who was Grieppe's partner at the time of the
12 incident, arrived on the scene with Grieppe in their police
13 cruiser. As soon as they got out of the car, Grieppe went to
14 assist Crawford, and Oaxaca turned in the other direction to
15 "protect them from the surrounding crowd." Oaxaca Depo. at 20.
16 Oaxaca did not see Grieppe and Crawford arrest Plaintiff because
17 he had his back to them the entire time. *Id.*

18 Plaintiff emphasizes that, according to Crawford's version
19 of the event, Plaintiff was screaming hysterically as she was
20 being handcuffed. Plaintiff argues that even if Oaxaca had his
21 back to Plaintiff during the arrest, Oaxaca must have heard her
22 screaming, as it is undisputed that he was positioned only a
23 short distance from the site of Plaintiff's arrest. However,
24 Oaxaca was not asked during his deposition whether he heard
25 Plaintiff screaming over the noise of the melee. Plaintiff's
26 claim is based on no more than speculation. Plaintiff has no
27 facts to support her assertion that Oaxaca actually observed
28 (either visually or auditorily) the allegedly unconstitutional

1 conduct. Accordingly, no reasonable finder of fact could
2 conclude that Oaxaca had a duty to intervene on Plaintiff's
3 behalf. Oaxaca is entitled to summary judgment on the First
4 Cause of Action.

5 Officer Pimental, who responded to the Copper Rhino on
6 horseback, testified at his deposition that he observed Plaintiff
7 on top of a "dog pile" of people. Pimental Depo. 19-20. He
8 observed Sergeant Crawford arrive on the scene, but did not have
9 an opportunity to observe any of Crawford's conduct toward
10 Plaintiff because his attention was diverted toward other people
11 coming out of the Copper Rhino. Among other things, Pimental was
12 distracted by another member of Plaintiff's group, Melody
13 Wheeler, who was trying to move around his horse toward the pile
14 of people. *Id.* at 22. Pimental instructed her not to move
15 around his horse and to back away, but she did not comply. *Id.*
16 at 23. Pimental grabbed Wheeler and escorted her away, at which
17 time he handed her off to a ground officer to place her in the
18 car for him. He then placed Wheeler under arrest. *Id.* Again,
19 there is no evidence which would permit a reasonable finder of
20 fact to conclude that Pimental had a duty to intervene on
21 Plaintiff's behalf.

22 Officer Scopesi, who was also on horseback, trying to
23 control the crowd, observed Plaintiff "on the back of a security
24 officer" with her "arm around [his] neck from behind." Scopesi
25 Depo. at 22. However, that was all he observed in connection
26 with Plaintiff. He did not see officer Crawford approach or take
27 any actions in connection with the arrest, because he was dealing
28 with the crowd. *Id.* at 25. No reasonable finder of fact could

1 conclude that Scopesi had a duty to intervene on Plaintiff's
2 behalf.

3 Plaintiff has no evidence suggesting that Officers Oaxaca,
4 Pimental, or Scopesi observed Crawford and Griep's conduct in
5 connection with her arrest. Defendants Oaxaca, Pimental, and
6 Scopesi are entitled to summary judgment on the First Cause of
7 Action.³

8
9 B. Count VI - Section 1983 Monell Claim Against the City
10 of Modesto.

11 Defendants move for summary judgment on Plaintiff's Fourth
12 Cause of Action, which alleges that the City of Modesto violated
13 her constitutional rights. "Local governments are only liable
14 under § 1983 for constitutional torts that amount to a custom or
15 policy." *Picray v. Sealock*, 138 F.3d 767, 772 (9th Cir. 1998)
16 (citing *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S.
17 658, 691 (1978)).

18 A Plaintiff can establish municipal liability in one of
19 three ways: "(1) by showing a longstanding practice or custom
20 which constitutes the standard operating procedure of the local
21 government entity; (2) by showing that the decision-making
22 official was, as a matter of state law, a final policymaking
23 authority whose edicts or acts may fairly be said to represent

24
25 ³ Nor could any of the three officers possibly be liable
26 for assault and battery upon Plaintiff, as it is undisputed that
27 none of them touched her. Plaintiff has indicated her intent to
28 dismiss the false arrest claims against all defendants. Doc. 32
at 9.

1 official policy in the area of decision; or (3) by showing that
2 an official with final policymaking authority either delegated
3 that authority to, or ratified the decision of, a subordinate.”
4 *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 964 (9th
5 Cir. 2008. After proving that one of the three circumstances
6 existed, Plaintiff must also show that the circumstance was the
7 proximate cause of the constitutional deprivation. *Van Ort v.*
8 *Estate of Stanewich*, 92 F.2d 831, 836 (9th Cir. 1996).

9 Here, there is no evidence to support a *Monell* claim.
10 Plaintiff argues that the City of Modesto requires supervisors to
11 file reports when injuries occur incident to arrest and when
12 there has been a use of force. Doc. 32 at 8. Plaintiff
13 emphasizes that neither an injury report nor a use of force
14 report were filed “despite the fact that Plaintiff suffered
15 serious injuries and was the object of force sufficient to cause
16 those injuries.” *Id.* Plaintiff also complains that the fact
17 that the reports were never filed was never investigated by a
18 supervisor. *Id.*

19 Plaintiff cites *Marchese v. Lucas*, 758 F.2d 181 (6th Cir.
20 1985), for the proposition that the failure to investigate a
21 single, unconstitutional beating by police constitutes sufficient
22 evidence to raise a question of fact as to the training and
23 investigative policies of the police.

24 Plaintiff overreaches by asserting *Marchese* controls here.
25 In *Marchese*, a prisoner, who was under the complete control of
26 sheriff’s officers, was severely beaten on two separate occasions
27 in apparent retaliation for pointing a gun at an officer. *Id.* at
28 182. Among other things, the Sixth Circuit was concerned with

1 the fact that the record did not identify any participant in
2 these "obviously illegal assaults (although supervisory officers
3 were present at both)." *Id.* at 188. The evidence presented at
4 trial was "such as to demand acceptance of the fact that 1) the
5 shift officers on duty knew when this assault was going to take
6 place, 2) heard it in progress and 3) sought to the degree
7 possible, to cover up the attack after it occurred." *Id.* at 187.

8 *Marchese* concluded:

9 [T]he "official policy" of the sheriff and the County
10 of Wayne as represented by him in police matters [was
11 that]... where a citizen had made a life-threatening
12 gesture by pointing a gun at a sheriff's deputy, [his]
13 subsequent assault by brother officers ... would not
14 engender either serious investigation to discover the
15 perpetrators or official sanctions against their
16 conduct. It is this latter official policy which we []
17 regard as ratification of the illegal acts of the
18 unidentified officers....

19 *Id.* at 188.

20 Plaintiff asserts that the present case is like *Marchese*,
21 pointing to Modesto Police Department General Order 1.06, on the
22 "Use of Force," which provides that every use of force, "other
23 than voluntary submission to arrest or" or force used to
24 "overcome 'passive' resistance," should be documented in a use
25 of force report. Harden Depo., Ex. 5, p. 16 of 17, ¶ VIII.A.
26 When asked to review a copy of Sergeant Crawford's written report
27 of the incident, *id.* at Ex. 6, Michael Harden, Assistant Chief of
28 the Modesto Police Department, indicated that, according to
Crawford's description of the event, Plaintiff put up "more than
passive" resistance. Harden Depo. at 49. Harden, who is one of
Crawford's ultimate supervisors, could not explain why no use of
force report was filed, indicating that he did not "know what was

1 in Sergeant Crawford's mind at the time." *Id.* at 49. Plaintiff
2 asserted during oral argument that the City's failure to
3 investigate why Crawford failed to file a use of force report
4 constitutes "ratification" of Crawford's conduct, as did the
5 failure to launch an investigation to discover the officers who
6 perpetrated the beatings in *Marchese*. This reads too much into
7 Harden's testimony. Harden qualified his comments regarding
8 Crawford's failure to file a report:

9 It is telling for me to read the report and find that
10 she lost her footing and fell to the ground. That
11 would imply to me that he did not necessarily
12 manipulate her to the ground, that she fell to the
13 ground on her own. So that was not part of the use of
14 force. Once on the ground, she flailed her arms and
15 what have you. While that may seem more than passive,
16 yes, you are asking me to speculate on why Sergeant
17 Crawford may not have done something, and I just don't
18 know.

19 *Id.* at 50. Here, unlike in *Marchese*, there are legitimate
20 disputes regarding the need for and nature of the force utilized.
21 According to Harden, Crawford's written report contains
22 information that could explain why he did not file a use of force
23 report. Further distinguishing the *Marchese* decision, there is
24 no evidence here of a cover-up or any effort to conceal the
25 identity of the officers involved in Plaintiff's arrest. Their
26 names, and the names of all other officers responding to the
27 Copper Rhino that evening, were revealed to Plaintiff during
28 discovery. On the other hand, if Plaintiff's description of the
events is true, the arresting officer should arguably have
prepared a report if Plaintiff was thrown to the ground and an
officer kneeled on her back while she resisted arrest. If those
facts are believed, the failure to file a use of force report is

1 a violation of Modesto Police Department policy and was followed
2 by a failure to investigate.

3 Plaintiff's *Monell* Claim is marginal, but cannot be resolved
4 as a matter of law. Defendants' motion for summary judgment on
5 the Fourth Cause of Action is DENIED.

6
7 C. Section 1983 Claim against Sergeant Crawford and
8 Officer Griep.

9 1. Section 1983.

10 Section 1983 creates a cause of action against any person
11 who, acting under the color of state law, violates rights
12 established by the Constitution or the laws of the United States.
13 *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir.
14 2002). "Section 1983 does not create any substantive rights, but
15 is instead a vehicle by which plaintiffs can bring federal
16 constitutional and statutory challenges to actions by state and
17 local officials." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th
18 Cir. 2006). To prevail on a section 1983 claim, Plaintiff must
19 show (1) Defendants acted under color of state law and (2)
20 violated Plaintiff's federal constitutional or statutory rights.
21 *Dawson v. City of Seattle*, 435 F.3d 1054, 1061 (9th Cir.
22 2006) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

23 Here, there is no dispute that the Defendant Officers acted
24 under color of law. The question is whether Defendants violated
25 Plaintiff's federal constitutional rights. Plaintiff asserts
26 that she was subject to excessive force, which implicates the
27
28

1 Fourth Amendment.⁴ Defendants assert the defense of qualified
2 immunity.

3
4 2. Qualified Immunity.

5 The Supreme Court recently summarized the purpose of
6 qualified immunity:

7 The doctrine of qualified immunity protects government
8 officials "from liability for civil damages insofar as
9 their conduct does not violate clearly established
10 statutory or constitutional rights of which a
11 reasonable person would have known." *Harlow v.*
12 *Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified
13 immunity balances two important interests-the need to
14 hold public officials accountable when they exercise
15 power irresponsibly and the need to shield officials
16 from harassment, distraction, and liability when they
perform their duties reasonably. The protection of
qualified immunity applies regardless of whether the
government official's error is "a mistake of law, a
mistake of fact, or a mistake based on mixed questions
of law and fact." *Groh v. Ramirez*, 540 U.S. 551 (2004)
(Kennedy, J., dissenting) (citing *Butz v. Economou*, 438
U.S. 478, 507 (1978) (noting that qualified immunity
covers "mere mistakes in judgment, whether the mistake
is one of fact or one of law"))).

17 Because qualified immunity is "an immunity from suit
18 rather than a mere defense to liability ... it is
19 effectively lost if a case is erroneously permitted to
20 go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526
21 (1985) (emphasis deleted). Indeed, we have made clear
22 that the "driving force" behind creation of the
23 qualified immunity doctrine was a desire to ensure that
24 "'insubstantial claims' against government officials
25 [will] be resolved prior to discovery." *Anderson v.*
Creighton, 483 U.S. 635, 640, n. 2 (1987). Accordingly,
"we repeatedly have stressed the importance of
resolving immunity questions at the earliest possible
stage in litigation." *Hunter v. Bryant*, 502 U.S. 224,
227 (1991) (per curiam).

26 *Pearson v. Callahan*, 129 S. Ct. 808 (Jan. 21, 2009) (parallel

27 ⁴ Plaintiff has voluntarily dismissed her unlawful arrest
28 claim, Doc. 40, and did not suggest in her papers or at oral
argument that she intends to pursue a § 1983 claim based on false
arrest.

1 citations omitted).

2 Deciding qualified immunity normally entails a two-step
3 analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court
4 must ask whether, taken in the light most favorable to the
5 plaintiff, the facts alleged show the officers' conduct violated
6 a constitutional right. *Id.* In addition, a court must also
7 inquire whether the right violated was "clearly established" by
8 asking whether a reasonable officer could believe that the
9 defendant's actions were lawful. *Id.*

10 The traditional summary judgment approach should be used in
11 analyzing the first step of the *Saucier* analysis:

12 A court required to rule upon the qualified immunity
13 issue must consider, then, this threshold question:
14 Taken in the light most favorable to the party
15 asserting the injury, do the facts alleged show the
16 [official's] conduct violated a constitutional right?
Where the facts are disputed, their resolution and
determinations of credibility are manifestly the
province of a jury.

17 *Wall v. County of Orange*, 364 F.3d 1107, 1110-11 (9th Cir.2004)
18 (internal citations and quotations omitted). In the second step,
19 the court must ask whether it would be clear to a reasonable
20 official that his conduct was unlawful in the situation
21 confronted. Although this inquiry is primarily a legal one,
22 where the reasonableness of the officer's belief that his conduct
23 was lawful "depends on the resolution of disputed issues of fact
24 ... summary judgment is not appropriate." *Wilkins v. City of*
25 *Oakland*, 350 F.3d 949, 956 (9th. Cir.2003) (citing *Saucier*, 533
26 U.S. at 216 (Ginsburg J., concurring)). District courts have
27 discretion to determine the order in which these inquiries take
28 place. *Pearson*, 129 S. Ct. at 818-822.

1 3. Qualified Immunity Applied to Excessive Use of
2 Force Claim.

3 An officer is justified in using "reasonable force" in
4 effectuating the arrest to the extent the force employed was
5 objectively reasonable. *Tatum v. City and County of San*
6 *Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006) (citing *Graham v.*
7 *Connor*, 490 U.S. 386, 395-397 (1989)).

8 When analyzing excessive force claims, a court's initial
9 inquiry is "whether the officers' actions were 'objectively
10 reasonable' in light of the facts and circumstances confronting
11 them." *Id.* (citing *Graham*, 490 U.S. at 397). A court must
12 "consider the facts underlying an excessive force claim from the
13 perspective of a reasonable officer on the scene, without regard
14 to the arresting officer's subjective motivation for using
15 force." *Id.* (citing *Graham*, 490 U.S. at 396-97). "Whether a
16 particular use of force was 'objectively reasonable' depends on
17 several factors, including the severity of the crime that
18 prompted the use of force, the threat posed by a suspect to the
19 police or to others, and whether the suspect was resisting
20 arrest." *Id.* (citing *Graham*, 490 U.S. at 396).

21 The calculus of reasonableness must embody allowance
22 for the fact that police officers are often forced to
23 make split-second judgments-in circumstances that are
24 tense, uncertain, and rapidly evolving-about the amount
25 of force that is necessary in a particular situation.

26 *Graham*, 490 U.S. at 396-97.

27 Applying the second step of the *Saucier* analysis, a court
28 must ask whether it would be clear to a reasonable official that
29 his conduct was unlawful in the situation confronted. Although
30 this inquiry is primarily a legal one, where the reasonableness

1 of the officer's belief that his conduct was lawful "depends on
2 the resolution of disputed issues of fact ... summary judgment is
3 not appropriate." *Wilkins*, 350 F.3d at 956.⁵

4 Plaintiff relies on *Deorle v. Rutherford*, 272 F.3d 1272 (9th
5 Cir. 2001), to assert that the Sergeant Crawford and Officer
6 Griep's conduct was clearly unreasonable. In *Deorle*, the
7 plaintiff, an emotionally disturbed man, was injured when a
8 police officer fired a lead-filled "beanbag round" into his face.
9 The officer did so even though it was undisputed that Deorle "was
10 unarmed, had not attacked or even touched anyone, had generally
11 obeyed the instructions given him by various police officers, and
12 had not committed any serious offense." *Id.* at 1275. The
13 approach taken by the Ninth Circuit is instructive.

14 In determining whether the officer used excessive force, the
15 Ninth Circuit asked whether the officer made a "reasonable
16

17 ⁵ Defendant correctly points out that an officer is
18 entitled to summary judgment if he had a reasonable, though
19 mistaken, view of either the law or the facts. "An officer might
20 correctly perceive all of the relevant facts, but have a mistaken
21 understanding as to whether a particular amount of force is legal
22 in those circumstances." *Saucier*, 533 U.S. at 205. "If the
23 officer's mistake as to what the law requires is reasonable,
24 however, the officer is entitled to the immunity defense." *Id.*
25 "The converse also is true: Officers can have reasonable, but
26 mistaken, beliefs as to the facts establishing the existence of
27 probable cause or exigent circumstances, for example, and in
28 those situations courts will not hold that they have violated the
Constitution." *Jeffers v. Gomez*, 267 F. 3d 895, 909 (9th Cir.
2001). But, these rules do not displace the traditional summary
judgment process. A court may not resolve on summary judgment
disputes that go to the reasonableness of the officer's belief
that the conduct was lawful or the credibility of the officer's
own recollection of the facts.

1 mistake as to the legality of his actions." *Id.* at 1285 (citing
2 *Saucier*, 533 U.S. at 206).

3 We assume, arguendo, that [the officer] thought that
4 the force he used was not excessive; however, that is
5 not the issue. Rather, the question is whether [the
6 officer's] use of force was premised on a reasonable
7 belief that such force was lawful, or, as the Supreme
8 Court recently put it: "whether it would be clear to a
9 reasonable officer that his conduct was unlawful in the
10 situation he confronted." [*Saucier*, 533 U.S. at 213].
11 The Court also explained the purpose of the rule:
12 "[q]ualified immunity operates ... to protect officers
13 from the sometimes hazy border between excessive and
14 acceptable force." *Id.* at [206]. It helps, therefore,
15 to begin our discussion with the observation that, on
16 the basis of the facts we have discussed, this is by no
17 means a borderline case. It should have been clear to
18 any reasonable officer that, under the circumstances
19 present, firing at Deorle was objectively unreasonable.

20 Every police officer should know that it is objectively
21 unreasonable to shoot-even with lead shot wrapped in a
22 cloth case-an unarmed man who: has committed no serious
23 offense, is mentally or emotionally disturbed, has been
24 given no warning of the imminent use of such a
25 significant degree of force, poses no risk of flight,
26 and presents no objectively reasonable threat to the
27 safety of the officer or other individuals. Here, all
28 those factors were present. Deorle had complied with
the police officers' instructions, had discarded his
potential weapons whenever asked to do so, and had not
assaulted anyone; in addition, a team of negotiators
essential to resolving such situations was en route.

Id.

20 The Ninth Circuit held that "[a]lthough there is no prior
21 case prohibiting the use of this specific type of force in
22 precisely the circumstances here involved, that is insufficient
23 to entitle [the officer] to qualified immunity: notwithstanding
24 the absence of direct precedent, the law may be, as it was here,
25 clearly established." *Id.* at 1285-86.

26 Otherwise, officers would escape responsibility for the
27 most egregious forms of conduct simply because there
28 was no case on all fours prohibiting that particular
manifestation of unconstitutional conduct. When "the
defendant ['s] conduct is so patently violative of the

1 constitutional right that reasonable officials would
2 know without guidance from the courts' that the action
3 was unconstitutional, closely analogous pre-existing
4 case law is not required to show that the law is
5 clearly established." *Mendoza v. Block*, 27 F.3d 1357,
6 1361 (9th Cir.1994) (quoting *Casteel v. Pieschek*, 3
F.3d 1050, 1053 (7th Cir. 1993)). This is such a case.
No reasonable officer could have believed that
Rutherford's action in shooting Deorle with the "less
lethal" lead-filled beanbag round was appropriate or
lawful.

7 *Id.* at 1286.

8 Plaintiff asserts that this case is like *Deorle*, because
9 "the force applied [] to plaintiff's back by the knees of two
10 police officers, one of whom weighed 230 pounds, was sufficient
11 to break four ribs and cause multiple pneumothorax." Doc. 32 at
12 11. But, the nature of the force applied was not evaluated in a
13 vacuum in *Deorle*. Plaintiff correctly notes that the *Deorle*
14 court took the "character of the offense" into consideration,
15 noting that the officer had not observed Deorle harming or
16 attempting to harm anyone. He had merely been "roam[ing] about
17 the area and shout[ing] in an irrational manner." *Id.* at 1282.
18 Therefore, "the crime being committed, if any, was minor and the
19 danger to [the officer] and others appears to have been minimal."
20 *Id.* Plaintiff suggests that, similar to *Deorle*, she "was no
21 threat to anyone and committed no crime but for yelling at a
22 security guard." Doc. 32 at 11.

23 Whether the reasonableness of the officers' belief that
24 their conduct was lawful "depends on the resolution of disputed
25 issues of fact." *Wilkins*, 364 F.3d at 1110-11. If so, summary
26
27
28

1 judgment is not appropriate. *Id.*⁶ Although the Supreme Court
2 warned in *Saucier* that "to deny summary judgment any time a
3 material issue of fact remains on the excessive force claim ...
4 could undermine the goal of qualified immunity to avoid excessive
5 disruption of government and permit the resolution of many
6 insubstantial claims on summary judgment," 533 U.S. at 202
7 (internal citations and quotations omitted), Justice Ginsburg
8 clarified in her concurring opinion that "[o]f course, if an
9 excessive force claim turns on which of two conflicting stories
10 best captures what happened on the street, *Graham* will not permit
11

12 ⁶ Plaintiff suggests that whether the amount of force
13 used was constitutionally excessive is always for the jury to
14 determine. She cites *Byrd v. Clark*, 783 F.2d 1002, 1006 (11th
15 Cir. 1986), in which, on summary judgment, the Eleventh Circuit
16 found there was a triable dispute as to whether force was applied
17 to plaintiff after she ceased to resist arrest. The Eleventh
18 Circuit also reasoned that the severity of the injuries suffered
19 by plaintiff, while "not the determinative factor in assessing
20 whether or not a constitutional violation has occurred," was
21 "certainly probative of the amount of force used." *Id.* The Byrd
22 court held:

23 From the severity of an injury, it would be permissible
24 for a jury to infer that substantial force was applied
25 to the plaintiff. Whether that force was
26 constitutionally excessive under these facts, is for
27 the jury to determine.

28 *Id.* at 1006-1007. *Byrd* does not, as Plaintiff suggests, stand
for the proposition that every time a serious injury results from
the application of force, summary judgment is unwarranted.
Rather, *Byrd* stands for the unremarkable proposition that, where
facts material to the reasonableness of the force applied are in
dispute, the severity of injury may give rise to an inference
that the force used was excessive. Under such circumstances,
summary judgment is inappropriate.

1 summary judgment in favor of the defendant official," *id.* at 216.

2 Here, we have "two conflicting stories" regarding "what
3 happened on the street." Although Sergeant Crawford testified
4 that he saw Plaintiff holding Dye in a choke hold, Plaintiff
5 denies this. According to Plaintiff's version of the events, she
6 was reaching up to touch Dye on the arm to get his attention when
7 she was lifted off her feet and thrown to the ground face first.
8 Once she was down, Plaintiff asserts Crawford and/or Griep
9 placed their knees on her back. Crawford and Griep deny placing
10 their knees on Plaintiffs back and assert that the force used was
11 necessary because she was flailing around and resisting arrest.
12 Plaintiff denies doing so and denies resisting arrest.

13 The court's initial inquiry is "whether the officers'
14 actions were 'objectively reasonable' in light of the facts and
15 circumstances confronting them." *Id.* (citing *Graham*, 490 U.S. at
16 397). A court must "consider the facts underlying an excessive
17 force claim from the perspective of a reasonable officer on the
18 scene, without regard to the arresting officer's subjective
19 motivation for using force." *Id.* (citing *Graham*, 490 U.S. at
20 396-97). "Whether a particular use of force was 'objectively
21 reasonable' depends on several factors, including the severity of
22 the crime that prompted the use of force, the threat posed by a
23 suspect to the police or to others, and whether the suspect was
24 resisting arrest." *Id.* (citing *Graham*, 490 U.S. at 396).

25 Here, a melee, a potential riot, is a dangerous disturbance.
26 However, there are considerable factual disputes about the nature
27 of Plaintiff's actions prompting the use of force and whether she
28 resisted arrest. The reasonableness of the officers' belief that

1 their conduct was lawful cannot be determined on summary
2 judgment. Viewing the facts in a light most favorable to
3 plaintiff, if she was only trying to get the security guard's
4 attention to make a request and did not resist arrest, a
5 reasonable finder of fact could conclude that the force applied
6 in this case was objectively unreasonable under the
7 circumstances. This is exactly the type of factual dispute that
8 is not amenable to summary adjudication.

9
10 V. CONCLUSION

11 For the reasons set forth above, Defendants' motion for
12 summary judgment is:

13 (1) GRANTED as to all claims against Officers Pimental,
14 Scopesi, and Oaxaca;

15 (2) DENIED as to the section 1983 claim against the City of
16 Modesto;

17 (3) DENIED as to the section 1983 excessive force claims
18 against Sergeant Crawford and Officer Griep.

19 Defendants shall submit a form of order consistent with this
20 memorandum decision within five (5) days of electronic service.

21
22 IT IS SO ORDERED.

23 Dated: March 27, 2009

24 /s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE